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(FEDERAL MARITIME COMMISSION)
(SERVED MARCH 15, 1995)
(EXCEPTIONS DUE 4-6-95)
(REPLIES TO EXCEPTIONS DUE 4-28-95)

FEDERAL MARITIME COMMISSION

DOCKET NO. 95-02 NORDANA LINE AS

v.

JAMAR SHIPPING, INC.

Complainant ocean carrier alleged that respondent, a then licensed ocean freight forwarder, booked two shipments with complainant for the shipper and obtained freight money from the shipper, but failed to remit the money to complainant despite repeated inquiries. Furthermore, respondent failed to respond to the complaint or to a subsequent ruling and admitted that it had used the shipper's freight money for respondent's own purposes. It is <u>held</u>:

- (1) Respondent's failure to pay over freight money and admitted use of the money for its own purposes without legal excuse constitute an unjust or unfair device or means to avoid payment of freight lawfully due, in violation of section 10(a)(1) of the Shipping Act of 1984.
- (2) Respondent was a licensed freight forwarder, considered to be a fiduciary and held to high standards of integrity. Its behavior demonstrated a failure to establish and observe just and reasonable regulations and practices, in violation of section 10(d)(1) of the Act.
- (3) Complainant is awarded reparations in the full amount of the freight due, namely, \$52,676.84.

INITIAL DECISION¹ OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

By complaint served February 1, 1995, complainant Nordana Line, an ocean common carrier, alleges that it carried two shipments of oilwell supplies from Houston, Texas to Latakia, Syria in March 1984, but was never paid for its services. Nordana alleges that the shipper, a company known as Lidco Middle East Contractors Ltd., located in Cyprus, hired respondent Jamar Shipping, Inc., a licensed ocean freight forwarder, to make the various transportation arrangements, and transmitted money to Jamar to be paid to Nordana, amounting to \$52,676.84, the freight calculated under Nordana's tariff, but that Jamar Shipping never remitted this money to Nordana. Complainant alleges that this behavior violated both sections 10(a)(1) and 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. app. secs. 1709(a)(1) and 1709(d)(1), and asks for judgment against Jamar in that amount plus unspecified costs and attorney's fees.

Under the Commission's rules, respondent was supposed to file its answer to the complaint by February 21, 1995, but failed to do so. Under such circumstances, the Commission's rules authorize the presiding officer to "enter such rule or order as may be just" or, if need be, to "require such proof as he or she may deem proper. . . . " (46 CFR 502.64(b).) Although respondent had filed no answer and was therefore in default, because the complainant had furnished no evidence to support its allegations and because the

¹This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

Commission has cut back the scope of its jurisdiction under section 10(a)(1) of the Act, I instructed complainant to furnish evidentiary support for its allegations and permitted respondent to file a reply to my rulings if it chose to do so. (See Order to Supplement Record and Notice of Default, February 27, 1995.) However, for the second time, respondent has ignored the proceeding. In response to the ruling cited, complainant has furnished ample evidentiary support together with its legal arguments and there is no reason to delay issuing this decision based on the materials furnished. Of course, under the Commission's rules, respondent has still a third opportunity to state its position by filing exceptions to this decision if it so chooses. (See 46 CFR 502.227.) However, I officially notice that effective February 24, 1995, the Commission revoked Jamar's freight-forwarder license for failure to maintain a valid surety bond.²

To support its complaint, Nordana has furnished its statement of the facts with legal arguments and five attachments, consisting of relevant tariff pages, bills of lading, and the affidavit of Nordana's Eastbound Line Manager for its Houston agent, Weco Agencies (Texas), Inc., Mr. David E. Maskrey. These documents support the following findings of fact.

Acting under a contract with the shipper, Lidco Middle East Contractors Ltd., Jamar Shipping, at the time licensed as an ocean freight forwarder by the Commission, booked two shipments of oilwell supplies, which were loaded at Houston on board the MS SKODSBORG on March 9, 1994, and were discharged on or about April 7, 1994, at Latakia, Syria, and released to the consignee, Al Furat Petroleum Company. The

²See 46 CFR 502.226(a), and Order of Revocation, served March 8, 1995, effective February 24, 1995.

two shipments moved under Nordana's bills of lading B/L 006 and B/L 007, which provided for freight to be prepaid. Freight was calculated under a special project rate which Nordana had filed in its tariff (\$81.50 per cubic meter), plus various additional charges (terminal handling, bunker adjustment, and other incidental charges). Freight for B/L 006 amounted to \$52,242.07; for B/L 007, it amounted to \$434.77. The total freight therefore equals \$52,676.84. (See Maskrey affidavit plus rated bills of lading, Attachments B, C, and D.)

Under Nordana's tariff, on prepaid shipments, such as the instant ones, freight is due and payable within 21 days after the sailing of the ship from the port of loading. In this case the ship sailed from Houston on March 9, 1994, and the freight was therefore due on March 30, 1994. (See Maskrey affidavit at para. 5, and Nordana's Tariff Rule 7.) When Nordana did not receive payment, Mr. Maskrey contacted Ms. Nancy Maples, an officer of Jamar Shipping, who stated that she hoped to have the funds to make full payment by April 29, 1994. On May 6, 1994, she stated that she hoped to pay the freight owed to Nordana on or about May 9, 1994. On May 13, 1994, Byron Albright, Jamar's President, stated that Jamar had received funds from the shipper, Lidco, to pay Nordana's freight, but that Jamar had used the funds for other purposes. Over three months later, on August 19, 1994, Mr. Albright contacted Mr. James R. Boswell, Accounting and Administration Manager of Weco Agencies, again admitting that Jamar had used the funds received from the shipper for other purposes. Mr. Albright furthermore offered to settle the freight due for \$7,000, which he stated was the portion of the moneys received from Lidco which Jamar Shipping still possessed. During all the discussions with officers and representatives of Jamar, no defense or legal basis was provided for the refusal to pay over the funds to Nordana. Respondent Jamar Shipping has still not paid over the freight due to Nordana.

Discussion and Conclusions

Complainant argues persuasively that Jamar's conduct violates both sections 10(a)(1) and 10(d)(1) of the 1984 Act. Section 10(a)(1) provides that:

(a) No person may--(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable.

Complainant acknowledges that the Commission now requires more than a showing that a respondent has failed to pay freight due because of a stubborn but good-faith refusal to pay a disputed rate or charge to support a claim that section 10(a)(1) has been violated. As complainant correctly contends, to support such a charge, complainant must show some element of falsification, deception, fraud or concealment or some evidence of bad faith or deceit. Complainant cites several Commission decisions establishing these principles.³ Complainant argues that Jamar Shipping has demonstrated deceit and bad faith by obtaining Nordana's transportation services and thereafter making a series of false promises to Nordana regarding its intention to pay the freight owed. Complainant compares Jamar

³Complainant cites Unpaid Freight Charges, 26 SRR 735, 737-740 (1993); Bank Line Limited v. Jet Set Marine, Inc., 26 SRR 380 (1992); and Waterman Steamship Corporation v. General Foundries, Inc., 26 SRR 1173 (I.D.), adopted in relevant part, 26 SRR 1424 (1994). (See Complainant's Response to Order to Supplement Record at 4.)

Shipping's conduct to that of the respondent NVOCC in Hugh Symington v. Euro Car Transport, Inc., 26 SRR 871 (1993), and to the respondent freight forwarder in Adair v. Penn-Nordic Lines, Inc., 26 SRR 11, 24 (I.D.), F.M.C. notice of finality, October 24, 1991. In Hugh Symington, the respondent NVOCC had accepted and retained funds from the shipper but failed to transport the goods. Among other laws, respondent was found to have violated section 10(d)(1) of the 1984 Act by engaging in an unfair practice in the matter of loading and landing the shipment. In Adair, among other things, the freight forwarder had failed to remit money that was entrusted to it by the shipper promptly, holding the money for approximately four months. This conduct was found to have constituted bad faith on the part of the freight forwarder, a fiduciary. Complainant argues that respondent Jamar's refusal to transmit freight money to Nordana, which money Jamar had received from the shipper, is clear evidence of bad faith, in violation of section 10(a)(1). Complainant cites still another case to show that respondent Jamar Shipping has acted in bad faith, namely, Waterman Steamship Corporation v. General Foundries, Inc., 26 SRR 1173 (I.D.), adopted in relevant part, 26 SRR 1424 (1994). In Waterman, it is argued, at least the respondent shipper had asserted a defense to the claim for unpaid freight, but in the instant case, according to complainant, Jamar Shipping has admitted that it has not paid the freight due and has never asserted any justification for its nonpayment. Complainant argues that it would be unjust to allow Jamar Shipping to obtain Nordana's services, then to secure payment from the shipper and to retain the money received from its shipper-principal.

Complainant also argues that Jamar Shipping's conduct also violated section 10(d)(1) of the 1984 Act. That law provides that:

(1) No... ocean freight forwarder... may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Citing the Adair and Hugh Symington cases plus Dixie Forwarding, 8 F.M.C. 109, 116, 118 (1964), complainant argues that the cited law imposes a high standard of fiduciary duty upon licensed freight forwarders and that respondent Jamar Shipping violated that duty by failing to remit payment from its shipper-principal to Nordana. Complainant notes that in Adair, the respondent freight forwarder had held the shipper's money for four months before paying the carrier and was found to have violated its fiduciary duty (and section 10(d)(1)) whereas in the instant case Jamar Shipping has held the money for over a year and has never paid it over.

There is no question but that respondent Jamar Shipping booked the two subject shipments with Nordana Line, obtained freight money for the shipments from Jamar's shipper-principal, and failed to remit this money to Nordana. Furthermore, on at least two occasions, Jamar's President, Mr. Albright, admitted that Jamar had received the freight money from the shipper and had not only failed to remit it to Nordana but had used the funds for other purposes. On top of that, Mr. Albright even offered to settle with Nordana for \$7,000, the portion of the shipper's money that Jamar still retained. The only question is whether this conduct rises to the level of a violation of section 10(a)(1) or of 10(d)(1) of the 1984 Act. I conclude that it violates both.

As complainant has recognized and as the cases cited reveal, the Commission has in recent years restricted the scope of its jurisdiction under section 10(a)(1) to separate simple freight-collection cases where there are honest, good-faith disputes between carriers and

shippers from the type of behavior that illustrates an unjust or unfair device or means used by the shipper to avoid payment of lawful freight charges. After noting that the volume of complaints seeking unpaid freight had been increasing significantly, the Commission issued an interpretive rule which became 46 CFR 571.2, effective March 8, 1993. (See Unpaid Freight Charges, 26 SRR 735 (1993).) The Commission explained that it did not have jurisdiction under section 10(a)(1) to hear ordinary freight-collection cases which had traditionally been heard in courts. The Commission interpreted the statutory language of section 10(a)(1) referring to an "unjust or unfair device or means" to mean that something more than a claim of unpaid freight by a shipper together with the shipper's silence or failure to answer a complaint must be shown to prove a violation of the statute. The Commission further explained that a complaining carrier had the burden of proving each element of the offense charged and that the complainant must prove something more than a mere stubborn but good-faith refusal to pay a disputed rate or charge or a refusal to pay based on honest differences. (26 SRR at 737, 739.) The Commission specifically held that a complaining carrier could "not rely on the failure to pay plus the shipper's silence to establish that the shipper has obtained transportation at less than the applicable rates by an 'unjust or unfair device or means' in violation of section 10(a)(1) of the 1984 Act." (Id., at 739.) To illustrate what more must be shown by a complaining carrier other than mere failure to pay a freight bill, the Commission suggested a number of factors, e.g., "some element of falsification, deception, fraud, or concealment" (Id., at 737); "evidence of bad faith or deceit" (Id., at 740); shipper misrepresentation of its ability to pay, inducing carrier to relinquish cargo lien (Id., at 739-740). In several other cases arising under

section 10(a)(1), the Commission has explained in some detail what it considers to be the parameters of a section 10(a)(1) violation with regard to the use of an "unjust or unfair device or means." For example, in Waterman Steamship Corporation v. General Foundries, Inc., cited by complainant, 26 SRR 1424, the Commission found that a shipper who had accepted delivery of its cargo but soon thereafter canceled payment on its checks had induced the carrier to surrender the cargo and thus lose its lien because of a misrepresentation by the shipper as to its intentions to pay the freight. The shipper had furthermore reneged on its agreement to pay freight without contesting the charges upon delivery and claimed that it refused to pay freight because of claimed loss or damages on old shipments. The Commission found that this behavior by the shipper indicated "that General Foundries never had any intention of paying the lawful charges due for the shipments at issue." (26 SRR at 1429.) Consequently General Foundries was found to have used an unjust or unfair device or means to avoid payment of freight due and to have violated section 10(a)(1) of the Act.

In Bank Line Limited v. Jet Set Marine, Inc., 26 SRR 380, also cited by complainant, as noted above, the shipper attempted to avoid payment of lawful freight due the carrier by raising questionable defenses without furnishing supporting evidence despite having been given several opportunities to do so. Ultimately the respondent shipper's failure to furnish supporting evidence for its questionable defenses resulted in its suffering a default judgment for the amount of freight due.⁴

⁴See Docket No. 91-58 - Bank Line Limited v. Jet Set Marine, Inc., Default Judgment, June 16, 1992 (ALJ), F.M.C. notice of finality, July 22, 1992 (unreported). In the unreported decision it was explained that respondent shipper's repeated failure to furnish evidence supporting its questionable defenses for nonpayment of freight had raised the question of respondent's good faith and indicated that respondent was merely stalling and refusing to pay its freight bill without just cause. Respondent was therefore judged to have violated section 10(a)(1) of the Act. The decision was issued before the Commission issued its interpretive rule discussed above.

As a final illustration of the type of behavior by a shipper refusing to pay lawful freight charges, there is the case of Capitol Transportation, Inc. v. United States, 612 F.2d 1312 (1st Cir. 1979), cited by the Commission in Unpaid Freight Charges, cited above, 26 SRR at 739, and explained in China Ocean Shipping Company v. DMV Ridgeview, Inc., 26 SRR 50, 56 (ALJ), F.M.C. notice of finality, December 23, 1991, reconsideration denied, 26 SRR 200 (1992). In Capitol Transportation, the Court of Appeals affirmed the Commission, which had found Capitol Transportation to have violated the predecessor to section 10(a)(1) by continually raising baseless defenses to longstanding claims for payment even after its own auditor had verified the amounts of the claims and by attempting to organize other shippers against paying. The Court agreed that Capitol's refusal to pay had never been based on a good faith legal defense but only reflected a calculated decision to fight collection without any legal defense of any substance. The Court concluded that the case did not involve honest differences but rather bad faith on the part of Capitol which was tantamount to an unjust or unfair device or means to obtain transportation at lower than applicable rates. The Court did acknowledge, however, that Capitol's behavior "undoubtedly nears the outer limits of Section 16...." (612 F.2d at 1324.)

As noted earlier, complainant argues that Jamar Shipping, by accepting money from its shipper-principal and refusing to pay over the money to complainant, plus making several false promises to pay and admitting that it has used the money for its own purposes has shown deceit and bad faith similar to the type of behavior found to be unlawful in the cases cited above. Furthermore, as noted, in the instant case respondent has no defense to offer whereas in the other cases cited, such as *Waterman*, the respondents at least offered some

legal defenses. I agree that Jamar Shipping's behavior constitutes an unjust or unfair device or means to avoid payment of lawful freight due and that respondent has therefore violated section 10(a)(1) of the 1984 Act.⁵

The above finding would suffice to justify an order requiring Jamar Shipping to pay complainant the full amount of the freight due, namely, \$52,676.84. However, complainant also alleges a violation of section 10(d)(1), the requirement that ocean freight forwarders not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

As noted earlier, complainant contends that Jamar Shipping, as a licensed freight forwarder, occupied a fiduciary relationship to its principals and was expected to observe high standards of performance, especially with regard to the duty to pay over freight money received from shippers to carriers for services rendered by the carriers. Complainant is entirely correct.

The Commission has long held that ocean freight forwarders whom it licenses under section 19 of the 1984 Act (and did under its predecessor statute, section 44 of the 1916 Act) are fiduciaries performing vital, sensitive functions who are required to observe the highest standards of behavior toward their principals, the shippers. See the discussion and cases cited in *Adair v. Penn-Nordic Lines, Inc.*, cited above, 26 SRR at 23. For example,

⁵It is of no consequence that the cited cases involved shippers who had failed to pay lawful freight owed to carriers rather than a freight forwarder who also failed to pay the carriers. It is recognized that the freight forwarder, selected by the shipper, acts as the shipper's agent, and the forwarder is certainly a "person" mentioned in section 10(a)(1) of the Act. Although violations of section 10(a)(1) or its predecessor, section 16 of the 1916 Act, usually have been found against shippers, the Commission has also found that a freight forwarder participating in misclassifications of articles shipped had violated section 16. See Royal Netherlands Steamship Co. v. Federal Maritime Board, 304 F.2d 938 (D.C. Cir. 1962), affirming Misclassification and Misbilling of Glass Articles, 6 F.M.B. 155 (1960), as far as the forwarder's violation was concerned.

in Dixie Forwarding, 8 F.M.C. 109, 116, 118 (1964), the Commission had this to say about the role of the freight forwarder:

The freight forwarder occupies a position of enormous competitive and economic power as to carriers and enjoys a fiduciary relationship with shippers. He is in a position to do grave economic harm to both.

... the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder.

In License Application--Guy G. Sorrentino, 15 F.M.C. 127, 134-135 (1972), the Commission commented on the high standards expected of forwarders and of their responsibility to shippers and carriers as follows:

An important matter to be considered in determining an applicant's fitness is the fact that the prospective licensee will be a fiduciary for clients and, in addition, will occupy a unique position of trust in dealing with carriers and the public. Hence, it must appear that, as licensee, applicant will maintain a standard of professional conduct reflecting the highest degree of business responsibility and integrity, not only with clients but also with carriers and with the public. This latter duty is imposed in part because, in many instances, ocean freight forwarders have the practical ability to grant or withhold clients' freight moneys which, of course, are part of the lifeblood of the highly competitive business which they serve. As a result, by the grant of a license, an ocean freight forwarder gains the opportunity to use his experience and technical knowledge of the ocean freight business to enhance his own competitive and economic position at the expense of the carriers and the public. Such opportunities, while they are frequent and tempting, must be resisted. The customs of their high calling, as reflected in the statute and the Commission's rules and regulations, require freight forwarders to be ever mindful of their responsibility to the carriers and the public they serve as well as their duty to their clients. (Emphasis added.)

As shown by the quotation from *Sorrentino*, the Commission was especially concerned over the fact that a licensed freight forwarder had the ability to withhold shippers' money

from carriers to whom it was owed. The Commission had found freight forwarders to have violated their obligation to pay over freight money to carriers in a number of cases arising under the forwarders' licensing statute and regulations.⁶ (See E. Allen Brown, 22 F.M.C. 583, 603-605 (1980) (19 SRR 965), citing five earlier Commission cases involving failure of the freight forwarder to pay over freight money to carriers.) These cases usually involved more than mere violations of the payover rule and resulted in various sanctions, including revocation or denial of licenses, suspensions, or other corrective orders. However, there has been another case in which a private complainant alleged that a freight forwarder had failed to observe just and reasonable regulations and practices in violation of section 10(d)(1) and sought reparations for injuries caused thereby. See Adair v. Penn-Nordic Lines, Inc., cited above, 26 SRR 11, in which the respondent freight forwarder was found to have violated section 10(d)(1) of the Act for failure to pay over the shipper's money to the carrier promptly and for other reasons. (Cf. TAFE v. Waterman Steamship Corp. and Cosmos Shipping Co., 21 SRR 1293 (1982) (consignee has private right of action when freight forwarder violates Commission's freight-forwarder regulations or licensing statute).)

I find that respondent Jamar Shipping's refusal to pay over its shipper-principal's money to the complainant carrier, Nordana Line, together with its using that money for its own purposes, its continued refusal to pay Nordana, and its offer to pay Nordana only a portion of the money owned as a settlement with no legal justification or excuse all show

⁶At one time the Commission's regulations required licensed freight forwarders to pay over shippers' money to carriers within a certain period of time. However, in 1981 the Commission deleted the requirement of payover by a date certain and left the matter up to the market place to decide. See *Licensing of Ind. Ocean Freight Forwarders*, 20 SRR 1065, 1069 (1981). Of course, the Commission did not indicate that this change in the regulations was meant to condone the refusal of a freight forwarder to pay over to the carrier or any undue delay in paying over.

a failure of Jamar to establish and observe just and reasonable regulations and practices,

in violation of section 10(d)(1) of the 1984 Act.

It is therefore concluded that respondent Jamar Shipping has violated both

sections 10(a)(1) and 10(d)(1) of the Shipping Act of 1984 and that complainant is entitled

to its freight money in the amount of \$52,676.84. Complainant is given judgment for that

amount, plus interest to be calculated by the Commission, as provided by 46 CFR 502.253,

such interest running from March 30, 1994, the due date for payment of freight provided by

complainant Nordana's tariff rule. Complainant is also entitled to petition for an award of

attorney's fees at the appropriate time if it so chooses. (See 46 CFR 502.254.)

Norman D. Kline

Administrative Law Judge

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Washington, D.C. March 15, 1995